Nos. 94-1361, 94-1477

SUPREME COURT, U.S.
FILED
JUL 3 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE ZICHERMAN, Individually and as executrix of the estate of Muriel A.M.S. Kole, and MURIEL MAHALEK,

Petitioners/Cross-Respondents,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent/Cross-Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT/CROSS-PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, pursuant to the general maritime law principles of *Gaudet*,[1] and in light of *Higginbotham*[2] and *Miles*[3], non-pecuniary damages for loss of society are recoverable for a death occurring on the high seas within the meaning of DOHSA[4] during the course of international air transportation within the meaning of the Warsaw Convention[5]? (Question from Cross-Petition in No. 94-1477).

II. Whether a financially nondependent mother and sister of a decedent may recover damages for loss of society under general maritime law, for a death on the high seas within the meaning of DOHSA, during the course of international transportation by air within the meaning of the Warsaw Convention? (Question I from Petition in No. 94-1361).

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1 *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974).

2 *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

3 *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

4 Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*

5 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502.

LIST OF ALL PARTIES AND RULE 29.1 LISTING

A. Respondent/Cross-Petitioner

The Respondent/Cross-Petitioner is KOREAN AIR LINES CO., LTD. (hereinafter "KAL") who was the defendant-appellant/cross-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Cargo Terminal Co., Ltd.
Air Korea Co., Ltd.
Daehan Oil Pipeline Corporation
Government Bonds
Hana Bank
Hanil Bank
Hanjin Construction Co., Ltd.
Hanjin Data Communication
Hanjin Heavy Industry Co., Ltd.
Hanjin International Corp.
Hanjin Int'l Japan Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Oil Refinery Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Investment Corporation
Korean French Banking Corporation
Korea Technology Development Co., Ltd.
Kyungki Bank, Ltd.
Peace Bank of Korea
Terminal One Management Inc.
The Company Fund
The Korea Economic Daily

B. Petitioners/Cross-Respondents

The Petitioners/Cross-Respondents are Marjorie Zicherman and Muriel Mahalek, who were the plaintiffs-appellees/cross-appellants in the Court of Appeals.

C. Amici

The following briefs *amici curiae* have been filed in support of the position of Petitioners/Cross-Respondents:

1. Brief *Amicus Curiae* of the Plaintiffs' Committee in *In re Air Crash Disaster at Lockerbie, Scotland*, MDL 799 (E.D.N.Y) ("*Lockerbie Amicus Brief*").

2. Brief *Amici Curiae* of Philomena Dooley, *et al.*, plaintiffs in *In re Korean Air Lines Disaster*, MDL 565 (D.D.C.) ("*KAL Amicus Brief*").

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is officially reported at 43 F.3d 18 (2d Cir. 1994) and is reproduced in the Appendix to the Petition for Writ of Certiorari filed by Petitioners/Cross-Respondents on February 9, 1995 at A1-11.[1] The opinions of the district court are officially reported at 807 F. Supp. 1073 (S.D.N.Y. 1992) (A12-42), 146 F.R.D. 61 (S.D.N.Y. 1992) and 814 F. Supp. 605 (S.D.N.Y. 1993).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 5, 1994. CA1. A timely Petition for Rehearing filed by Korean Air Lines Co., Ltd. ("KAL") was denied by Order, also dated December 5, 1994.[2] Petitioners/Cross-Respondents ("Plaintiffs") filed a Petition for a Writ of Certiorari on March 7, 1995, which the Court granted on April 7, 1995, limited to the first question presented by the Petition. KAL filed a Cross-Petition for a Writ of Certiorari on February 9, 1995, which the Court granted on April 7, 1995. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

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[1] References preceded by "A" refer to pages in the Appendix to the Petition for Writ of Certiorari filed by the Petitioners/Cross-Respondents. References preceded by "CA" refer to pages in the Appendix to the Cross-Petition for a Writ of Certiorari filed by KAL. References preceded by "J.A." refer to pages in the Joint Appendix.

[2] The Court of Appeals originally issued an opinion on November 3, 1994. *See Zicherman v. Korean Air Lines*, Nos. 93-7490, 93-7546, 1994 Westlaw 606516 (2d Cir. Nov. 3, 1994)(J.A. 104). Following the filing by KAL of a Petition for Rehearing and Suggestion for Rehearing *In Banc*, the November 3, 1994 opinion was "withdrawn" and an "amended" opinion and judgment were filed on December 5, 1994, wherein the Court of Appeals also denied KAL's Petition for Rehearing. *See* Judgment and Order dated December 5, 1994 at CA1. KAL's Suggestion for Rehearing *In Banc* was denied by Order dated January 20, 1995. *See* CA3.

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable statute is the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.* ("DOHSA"). The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502 ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix hereto at App. 1a-4a.

STATEMENT OF THE CASE

A. Nature of the Case. This litigation arises from the crash in international waters of KAL flight KE007 on September 1, 1983, when Soviet military aircraft shot down flight KE007 while en route to Seoul, South Korea from Anchorage, Alaska. All 269 persons on board the aircraft were killed. The case previously was before the Court on another question. *See Chan v. Korean Air Lines*, 490 U.S. 122 (1989). The present controversy involves the question whether nonpecuniary damages for loss of society are recoverable under the Warsaw Convention for the death of a passenger in an aircraft accident on the high seas within the meaning of DOHSA.

The Plaintiffs are the sister (Marjorie Zicherman) and the mother (Muriel Mahalek) of Muriel Kole ("decedent")[3], one of the passengers killed in the crash of KAL flight KE007. They seek damages under the Warsaw Convention and DOHSA individually and on behalf of the estate of the decedent. J.A. 29-30.

B. The Warsaw Convention and DOHSA. It is not disputed that this action is governed by the Warsaw Convention,

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[3] Decedent's husband, Michael Kole, instituted two separate actions to recover damages for the death of decedent in the United States District Court for the Northern District of California. *Kole v. Korean Air Lines*, Nos. 83-4038, 83-4381 (N.D. Cal.). Michael Kole was not a party to the proceedings below.

as supplemented by the Montreal Agreement.[4] The decedent was traveling on KAL flight KE007 pursuant to a passenger ticket providing for international transportation within the meaning of Article 1 of the Convention. Although the Warsaw Convention has been held to create a cause of action for wrongful death,[5] the Convention does not set forth the types of recoverable "compensatory damages"[6] or the proper claimants in the event of the death of a passenger. These questions intentionally were left by the drafters of the Convention for determination by the national law of each contracting party to the Convention. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1488 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) ("*Korean Air II*").

The death of Muriel Kole ("decedent") occurred on the high seas within the meaning and statutory scope of DOHSA. 46 U.S.C. App. § 761; J.A. 29. DOHSA is the national law of the United States which is applicable to and prescribes the recoverable damages and proper claimants for all deaths occurring on the high seas. 46 U.S.C. App. § 761 (App. 3a). DOHSA specifically restricts recoverable damages to pecuniary losses only and does not permit the recovery of nonpecuniary dam-

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[4] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302). The Warsaw Convention, together with the Montreal Agreement, serves to limit an air carrier's liability for a passenger death to the sum of $75,000, unless the death was proximately caused by the "wilful misconduct" of the air carrier within the meaning of Article 25 of the Convention, in which event the monetary limit on recoverable damages is not available to the carrier.

[5] *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

[6] The phrase "compensatory damages" refers to damages other than purely mental anguish damages of a passenger and punitive damages, recovery of which is precluded by Article 17. *See Eastern Airlines v. Floyd*, 499 U.S. 530 (1991); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1485-90 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

ages for loss of society. *See* 46 U.S.C. App. § 762 (App. 3a); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30-33 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622-25 (1978).

C. The Damage Trial in the District Court. The liability of KAL was determined in the context of multidistrict litigation proceedings in the District Court for the District of Columbia when a jury found that the destruction of KAL flight KE007 was proximately caused by the "wilful misconduct" of the flight crew of KAL. *See Korean Air II*, 932 F.2d at 1476-79.

Prior to the subsequent damage trial in the district court, KAL moved, *inter alia*, for a determination that DOHSA, as the law directly applicable to all deaths occurring on the high seas, (1) prescribes the recoverable damages and the proper claimants and (2) prohibits the recovery of nonpecuniary damages for loss of society. A3. The district court denied KAL's motion and held that Plaintiffs were entitled to recover nonpecuniary damages for loss of society. A3. At the conclusion of the ensuing damage trial, the jury awarded damages for loss of society in the sum of $28,000 to the mother and $70,000 to the sister of the decedent.[7] A4. KAL appealed and Plaintiffs cross-appealed.

D. The Decision of the Court of Appeals. The Court of Appeals, recognizing that the Warsaw Convention leaves to national law the determination of the types of recoverable compensatory damages, concluded that it had to decide "which federal law to apply" in determining whether nonpecuniary damages for loss of society are recoverable for a DOHSA death occurring during Warsaw Convention trans-

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[7] The jury also awarded damages in the amount of $161,000 for survivor's grief to Plaintiffs, $14,000 for loss of support and inheritance to the sister and $100,000 for the pre-death pain and suffering of the decedent. A4. The award of grief damages was set aside by the court below as a matter of law. A8-9. The award for loss of support and inheritance was remanded for further proceedings. A7-8. These awards are not involved in the questions under review.

portation. A5-6. The Court of Appeals held that loss of society damages are recoverable in this case "under the general maritime law principles of *Gaudet* and its progeny". A6.[8] The court applied *Gaudet* because it considered itself bound by its earlier decision in *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) ("*Lockerbie II*"), a case involving Warsaw Convention death actions arising from an aircraft accident on land, as to which DOHSA did not apply. The *Lockerbie II* decision was itself premised on an earlier decision of the same court in *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267, 1274-80 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie I*"), which held that the Warsaw Convention provides the "exclusive" cause of action for death and that "federal common law" governs the extent of the damages recoverable pursuant to this "exclusive" cause of action.

The court in *Lockerbie II*, in fashioning a federal damage rule for Warsaw Convention cases, found general maritime law to be the best source of federal common law. *Lockerbie II*, 37 F.3d at 828-29. The *Lockerbie II* court adopted *Gaudet* as representative of general maritime law and, therefore, allowed for the recovery of loss of society damages in Warsaw Convention cases for deaths that occur on land. *Id.*

Although the death in this case, unlike the deaths in *Lockerbie II*, occurred on the high seas within the meaning of DOHSA, the court below rejected DOHSA as the applicable national law, and instead extended *Gaudet* to the high seas to allow for the recovery of loss of society damages. A5-6. To achieve this result, the court reasoned:

1. *Lockerbie I* stressed that uniformity should govern the Warsaw Convention cause of action (A5-6);

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[8] *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), a non-DOHSA case, held that loss of society damages were recoverable under general maritime law based on the doctrine of unseaworthiness by the financially dependent wife of a longshoreman killed in the territorial waters of the United States. *Id.* at 585-90.

2. the adoption by the court of one damage rule for deaths occurring on land (general maritime law/*Gaudet*) and another damage rule for deaths occurring on the high seas (DOHSA), would defeat this desire for uniformity in the types of recoverable damages in Warsaw Convention cases (A5-6); and

3. DOHSA's pecuniary loss provisions cannot be reconciled with the " 'aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention,' . . . including non-pecuniary loss" (A6).

In holding that loss of society damages are recoverable for a death on the high seas generally, the court below also held that a prerequisite to such an award is that the claimant must be financially dependent upon the decedent at the time of death. A7-8. As a result, the court set aside the damage award to the decedent's mother, for lack of financial dependency, and remanded the award to the decedent's sister for a factual determination as to her financial dependency at the time of decedent's death. A7-8, A10.

SUMMARY OF ARGUMENT

This action is governed by the Warsaw Convention and DOHSA. The principal question before the Court is whether the Plaintiffs are entitled to recover loss of society damages for the death of the decedent.

The Warsaw Convention does not delineate the types of damages recoverable in the event of an accident causing the death of a passenger during the course of Convention transportation. The drafters of the Convention left that subject for determination by the applicable national law of the contracting parties to the Convention.

In the United States, the directly applicable national law in this case is DOHSA, since the decedent was killed as a result of an aircraft crash on the high seas. DOHSA precludes the recovery of loss of society damages. The Court of Appeals

disregarded DOHSA and held that loss of society damages are recoverable in this case pursuant to the general maritime law principles of *Gaudet*, 414 U.S. at 573, where the Court allowed the recovery of loss of society damages in a non-DOHSA case. In this, the Court of Appeals erred.

The reason offered by the court below for rejecting DOHSA and following *Gaudet*, was its desire for a uniform rule as to recoverable damages in all Warsaw Convention cases, whether the death occurs on land or on the high seas. In light of the Second Circuit's earlier adoption of *Gaudet* for land based accidents in *Lockerbie II*, the court below viewed DOHSA as an obstacle to the court's desire for a uniform rule and, therefore, rejected DOHSA, in favor of *Gaudet*. This was contrary to the directions of the Court that a judicial desire for uniformity cannot override DOHSA where it applies. Moreover, because DOHSA addresses the very issue which the drafters of the Convention left to the national law of the contracting parties, the Convention and DOHSA are not in conflict, but actually complement each other.

The court below also erred in adopting *Gaudet* as representative of a general maritime law "rule" allowing the recovery of loss of society damages. A5-6. The court below ignored all subsequent limitations placed on *Gaudet* by the decisions of the Court and the prevailing rule that general maritime law cannot supplement the damages recoverable under DOHSA.

If the Court desires to adopt a uniform national rule of damages applicable to all Warsaw Convention cases, as urged by Plaintiffs and *Amici*, and as desired by the court below, then DOHSA should be the primary guide because (1) DOHSA must be applied to all aircraft accidents on the high seas and (2) although there is no directly applicable federal statute for deaths in aircraft accidents on land, all federal wrongful death statutes, like DOHSA, allow for the recovery of pecuniary damages only. Thus, the application of DOHSA directly in this case and by analogy to land accidents, will create national uniformity and would be consistent with all Congressional

enactments and policies concerning federal based wrongful death damage recovery.

ARGUMENT

I

THE TYPES OF COMPENSATORY DAMAGES RECOVERABLE IN A PASSENGER DEATH CASE GOVERNED BY THE WARSAW CONVENTION ARE TO BE DETERMINED BY REFERENCE TO THE NATIONAL LAW OF EACH CONTRACTING PARTY

The Court of Appeals, the *Amici* for Petitioners herein and the Plaintiffs in the court below, agree that the Warsaw Convention leaves the issue of the types of recoverable compensatory damages for the death of a passenger for determination by the national law of each contracting party to the Convention.[9] However, Plaintiffs now argue here that it is improper to look to the domestic law of the United States for the determination of this question, because loss of society damages are recoverable solely by reference to Article 17 of the Warsaw Convention and French damage law. Brief for Petitioners/Cross-Respondents at 7-11, 16-17 ("Plaintiffs' Brief"). This new argument of Plaintiffs runs directly contrary to the language, structure and drafting history of the Convention and to the interpretation given the Convention by the contracting parties.

The relevant provisions of the Warsaw Convention concerning the liability of the air carrier for compensatory damages are Articles 17 and 24. To determine whether the Warsaw Convention and these provisions themselves define the types of recoverable compensatory damages or defer to the national law of the contracting parties, the Court directs

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[9] *Zicherman*, 43 F.3d at 21 (A5); *Lockerbie Amicus Brief* at 10; *KAL Amicus Brief* at 17; *Plaintiffs' Second Circuit Brief*, Nos. 93-7490, 93-7546 at 5-7, 10 (2d Cir. Aug. 31, 1993) ("To properly interpret the phrase 'damage sustained' in Article 17, this Court must look to federal common law.")

that we should begin with the text of the treaty and the context in which the written words are used. *Eastern Airlines v. Floyd*, 499 U.S. 530, 534 (1991). As treaties are construed more liberally than private agreements, we also are to look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties. *Id.* at 535. Finally, the purposes of the Convention must be upheld and we are to give meaningful effect to the expectations of the contracting parties. *Id.* at 535, 546.

The conclusion that the types of recoverable compensatory damages in an action governed by the Warsaw Convention are to be determined by reference to the national law of each party to the Convention is consistent with the plain meaning of the language of Articles 17 and 24, the drafting history of the Convention, the goals of the Convention, the expectations and conduct of the parties to the Convention and precedent in American and foreign courts.

A. The Background and Goals of the Warsaw Convention

The Warsaw Convention was the result of two international conferences, the first held in Paris in 1925 and the second in Warsaw in 1929, and extensive preparatory work by *Comité International Technique d'Experts Juridiques Aériens* (CITEJA), which had the primary responsibility for preparing the draft convention and reports. *Chan v. Korean Air Lines*, 490 U.S. 122, 139 (1989).[10] The Warsaw Convention had two primary goals: first, and most important, to establish uniform liability rules and limit the liability of air carriers[11], and sec-

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[10] For a discussion of the goals and drafting history of the Convention, *see* Lowenfeld & Mendelson, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967); Ide, *History and Accomplishments of C.I.T.E.J.A.*, 3 J. Air. L. & Com. 27 (1932).

[11] Before the Warsaw Convention was adopted, carriers in civil law countries were permitted to contractually disclaim any liability for passenger injury or death. *Second International Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw Convention Minutes* at 42, 47 (R. Horner & D. Legrez transl. 1975) ("*1929 Warsaw Minutes*").

ond, to establish uniform rules governing documentation, such as airline tickets and air waybills, and a uniform procedure for addressing claims arising out of international air transportation. *Floyd*, 499 U.S. at 546.

Although the Convention addresses numerous matters relating to air carrier liability, many rules were determined to be unsuitable for uniform treatment by the Convention and intentionally were left to be resolved according to the national laws of the contracting parties. *See Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *see also Benjamins*, 572 F.2d at 922 (Van Graafeiland, J., dissenting).[12] One of the matters expressly left for resolution by resort to national law, pursuant to Article 24 of the Convention, was the types of the wrongful death damages recoverable for an Article 17 passenger death. *See infra*. at 11-21; H. Drion, *Limitation of Liabilities in International Air Law* at ¶ 111 (Martinus Nijhoff 1954) ("*Drion*"); D. Goedhuis, *National Airlegislations and the Warsaw Convention* at 269 (Martinus Nijhoff 1937) ("*Goedhuis*"); Note, *Beneficiaries' Claims After the Death of a Passenger as a Result of an Airplane Crash*, 12 Ars Aequi 17 (Nov. 1959) (in Dutch) ("*Ars Aequi*"); *cf. 1929 Warsaw Minutes* at 176, 188 (addressing scope of Convention and proposal of Czechoslovakia to refer to domestic law matters the Convention does not address).

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[12] *See, e.g.*, Article 21 (contributory negligence), Article 24(2) (standing and damages), Article 25 (standards for wilful misconduct), Article 28(2) (procedural questions) and Article 29 (limitation on time to sue).

B. The Plain Language and Drafting History of the Convention Evidence the Intent that the National Law of Each Contracting Party Is to Determine the Types of Compensatory Damages Recoverable for Passenger Death

1. Article 17 Establishes the Air Carrier's Liability for "Damage Sustained" But Leaves to National Law the Types of Recoverable Compensatory Damages

Article 17 of the Warsaw Convention provides:

> The carrier shall be liable for *damage sustained* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (App. 1a) (emphasis added).[13]

The phrase "damage sustained" does not and has never been held to define the types of recoverable compensatory damages.[14] Article 17 simply creates the air carrier's liability for "damage sustained" once the conditions for Article 17 liability are fulfilled.[15] The determination of the types of recov-

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[13] The official French text of Article 17 provides:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou cours de toutes opérations d'embarquement et de débarquement.

49 Stat. 3005.

[14] *Korean Air II*, 932 F.2d at 1490; *Lockerbie I*, 928 F.2d at 1274-80; *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987); *Rosman v. Trans World Airlines*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

[15] *See Floyd*, 499 U.S. at 532-33, 535-36; *Air France v. Saks*, 470 U.S. 392, 394 (1985); *Korean Air II*, 932 F.2d at 1490; *see also* Report of Secretary of State Hull, *reprinted in* 1934 U.S. Av. R. 239, 243 (1934).

erable compensatory damages for the death of a passenger is left to the national law of the contracting parties pursuant to Article 24(2). *Korean Air II*, 932 F.2d at 1488.

Plaintiffs argue that resort to national (or domestic) law is not proper because the phrase "damage sustained" (*dommage survenu*), as used in Article 17, allows for the recovery of loss of society damages by virtue of its ordinary meaning and its French legal meaning. Plaintiffs' Brief at 7-11, 16. Plaintiffs ignore the fact that the meaning of "damage" in 1929 varied greatly from country to country. *Drion*, at ¶ 112. In England and in the United States at that time, the term "damage" as used in death statutes was interpreted to mean only pecuniary loss.[16] Other Warsaw participants (*e.g.*, Austria, Denmark, Germany, Hungary, Netherlands, Soviet Union, Yugoslavia), similarly limited damages for death to pecuniary loss. *See* 11 *Int'l Encyclopedia of Comparative Law: Torts ch. 9*, at §§ 9-36, 9-40, 9-41, 9-42 pp. 15-18 (A. Tunc ed. 1972) ("*Int'l Encyclopedia*"); *Drion* at ¶ 112 n.112; *see also* B. Markesinis, *A Comparative Introduction to the German Law of Tort*, at 541 (Claredon Press 1986); *Introduction to Dutch Law for Foreign Lawyers* at 102-03 (2d ed., J. Chorus, P. Grever E. Hondius, A. Koekkoek eds., Kluwer 1993); V. Gsovski, *Soviet Civil Law: Private Rights and Their Background Under the Soviet Regime* at 538-54 (V. Gsovski transl., Univ. of Mich. Law School 1948); P. Haanappel, *The Right to Sue in Death Cases under the Warsaw Convention*, 6 Air. L. 66, 72-76 (1981) ("*Haanappel*"); *see also Floyd*, 499 U.S. at 544 n. 10.

While in French damage law the term "damage" (*dommage*) may encompass the concept of "*dommage matérial*" (pecuniary damage) and "*dommage moral*" (nonpecuniary damage),

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[16] The Courts in England interpreted the word "damages" in the Fatal Accidents Act 1846 (the Lord Campbell's Act) as providing only for pecuniary loss. *Salmond's Law of Torts*, at 429-33 (7th ed. 1928, W.T.S. Stallybrass); *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 71 (1913). A similar meaning was given to the word "damage" as it appears in federal death statutes, such as the Federal Employers' Liability Act ("FELA"), 45 U.S.C. App. § 59. *Vreeland*, 227 U.S. at 71 (word "damage" in FELA allows only for pecuniary loss or damage).

there is no suggestion in the Convention or in its drafting history that the drafters, by using the term "*dommage*" in the original French text, rather than "*dommage matérial*", intended to provide for the recovery of loss of society damages[17] or to have French damage law define the types of recoverable compensatory damages.[18] Plaintiffs' Brief at 10.

The fact that the national law of many of the Convention drafters, from both common law and civil law countries, did not allow for the recovery of nonpecuniary damages, belies the "assumption" drawn by Plaintiffs that the drafters had a specific intent to apply French damage law, rather than their own national law, for determining the types of recoverable damages in a Warsaw Convention case. *See supra* at 12; *Floyd*, 499 U.S. at 544 n.10. Contrary to Plaintiffs' assertions (Plaintiffs' Brief at 10), had the drafters intended that French damage law govern the types of recoverable damages in a Warsaw Convention case, it would have been a simple matter to have made a specific reference to French damage law in the Convention. *See Floyd*, 499 U.S. at 545 (if pure psychic damages were intended to be recoverable as "bodily injury", "the drafters most likely would have felt compelled to make an unequivocal reference" to such damages). At a minimum, it would have been hotly debated by delegates of those nations which did not recognize nonpecuniary damages for death. *See Lockerbie I*, 928 F.2d at 1284 (if drafters contemplated recov-

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[17] In arguing that French civil law allowed for the recovery of loss of society damages, Plaintiffs improperly confuse grief and mental suffering damages with loss of society damages. Plaintiffs' Brief at 8-11. Loss of society damages do not compensate family members for their mental suffering or grief, but for their loss of love, affection and companionship. *See Gaudet*, 414 U.S. at 585 n.17. The authority cited by Plaintiffs tends only to establish that French law allowed nonpecuniary damages for the grief and mental suffering of family members. Plaintiffs' Brief at 9-10 *citing authorities*.

[18] Plaintiffs' reliance on *Korean Air II*, *Floyd*, and *Lockerbie II*, is misplaced. *Korean Air II* and *Floyd* did not address the recovery of loss of society damages and *Lockerbie II* relied on the same inconclusive authority as Plaintiffs in concluding that French law allowed for the recovery of loss of society damages.

ery of punitive damages, it would have been "hotly" debated since most drafting states did not allow such damages).

The rationale of Plaintiffs, in effect, would incorporate into the Convention the entire body of French damage law, as it existed in 1929. This rationale flies in the face of the structure and wording of the Convention as well as the intent of the parties.[19]

Plaintiffs do not refer to any drafting history or authority to support their interpretation of Article 17, because none exists. The only recorded discussion during the 1929 Warsaw Conference that relates to the term "damage sustained" concerned the scope of the application of the Convention to a carrier's liability under Article 17. *See 1929 Warsaw Minutes* at 67-84, 166-67. This discussion reveals that the phrase "damage sustained", as it appeared in the original draft of Article 17 (draft Article 21), had a temporal meaning. Article 21 of the draft convention, prepared by CITEJA and submitted to a Second International Conference that convened in Warsaw in 1929, provided in relevant part:

> The carrier shall be liable for *damage sustained during carriage*:
>
> (a) in the case of death, wounding, or any other bodily injury suffered by a traveler;
>
> * * *

1929 Warsaw Minutes at 264-265 (emphasis added).

During the second reading of Article 21, the delegate from the Netherlands raised the question whether Article 21, as worded, would apply to the death of a passenger who is

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[19] It was recognized in the opening session of the 1929 Warsaw Conference that the drafters did not want to force "acceptance of one legal system or another." *1929 Warsaw Minutes* at 19. *Cf. Floyd*, 499 U.S. at 540 (declining to displace drafters' understanding that term "bodily injury" did not include psychic injury by reference to a meaning abstracted from French civil law, especially where other nations did not recognize actions for psychic injury).

injured during carriage but dies one or two days after the carriage has ended. *1929 Warsaw Minutes* at 166-67 (is the death "considered as *being sustained* during the carriage. . . "). The drafters considered that a death which occurs during carriage is the same as if the death occurs some days after the end of the carriage. *Id.* at 166-67. To ensure clarity, the phrase "occurred during carriage" was eliminated from the draft. *Id.* at 167. This was the only discussion at the Warsaw Conference touching upon the phrase "damage sustained".

Plaintiffs ignore that all courts in the United States and commentators agree that Article 17 does not define the types of recoverable compensatory damages for wrongful death and that this issue was left for determination by reference to the national law of each contracting party. *See Zicherman*, 43 F.3d at 21 (A5); *Lockerbie II*, 37 F.3d at 828; *Korean Air II*, 932 F.2d at 1488; *accord Lockerbie I*, 928 F.2d at 1283 ("Convention leaves the measure of damages to the internal law of parties to the Convention"); *Harris*, 820 F.2d at 1002 ("damages are to be measured according to the internal law of a party to the Convention"); *Benjamins*, 572 F.2d at 921 (Van Graafeiland, J. dissenting) ("Article 17 . . . does not specify. . . what types of damages may be recovered"); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 855 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965) (damages left to "internal law"); *see also* G. Calkins, *The Cause of Action Under the Warsaw Convention (Part II)*, 26 J. Air. L. & Com. 323, 339 (1959) ("*Calkins*"); *Haanappel* at 66; R. Mankiewicz, *The Liability Regime of the International Air Carrier*, at 155-56, 189 (Kluwer 1981) ("*Mankiewicz*"); N. Matte, *Treatise on Air-Aeronautical Law* at 382 (McGill Univ. 1981); G. Miller, *Liability in International Air Transport* at 125 (Kluwer 1977) ("*G. Miller*").

That the drafters intended that the types of recoverable compensatory damages be determined by reference to the national law of each contracting party, also is clear from the language and discussions leading to the adoption of Article 24.

2. Article 24(2) Directs the Courts to National Law to Ascertain the Types of Recoverable Compensatory Damages for Passenger Death

In confining their argument to the scope of Article 17 and the presumed meaning and intent of the phrase "damage sustained", Plaintiffs invite the Court to ignore the effect of Article 24 of the Convention on the questions presented. Article 24 provides:

> (1) In the cases covered by Articles 18 [baggage] and 19 [delay] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, *without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.*

49 Stat. 3020 (App. 1a) (emphasis added).[20]

The plain meaning and the intent of Article 24 is clear. "[P]ursuant to Article 24 the proper 'measure' of damages recoverable under Article 17 is left to the domestic law of the contracting states." *Korean Air II*, 932 F.2d at 1488; *see Lockerbie I*, 928 F.2d at 1274-80, 1283; *Harris*, 820 F.2d at 1002; *Mexico City*, 708 F.2d at 415; *Drion* at ¶ 111.

Plaintiffs argue that the phrase in Article 24(2)—"who are the persons who have the right to bring suit and what are their respective rights"—defers to domestic law only for resolution

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[20] The official French text of Article 24 provides:

> (1) Dans les cas prévus aux articles 18 et 19 toute action responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.
>
> (2) Dans les cas prévus à l'article 17, s'appliquent également les dispostions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs.

49 Stat. 3006.

of the "procedural" questions of who has standing to bring suit and the division of the proceeds, and does not defer to domestic law for resolution, the "substantive" question of what types of damages are recoverable for an Article 17 passenger death. Plaintiffs' Brief at 15-16. Plaintiffs offer no support for such an interpretation of Article 24(2). The argument also fails to recognize that the "right to bring suit" phrase, which refers to the class of persons entitled to claim damages, is related directly to the very types of damages that those persons can recover. *See Korean Air II*, 932 F.2d at 1488.[21]

Even if the narrow interpretation of Article 24(2) urged by Plaintiffs were to be accepted, so that "respective rights" means only how the damages are to be divided, a court first would be required to determine the types of damages properly recoverable before the recovered damages can be divided. Thus, the "respective rights" phrase necessarily must include a determination of the types of damages the persons suing may recover. *See Korean Air II*, 932 F.2d at 1488; *Harris*, 820 F.2d at 1002; *Drion* at ¶ 111.

The drafting history of Article 24(2) confirms that the right to sue for damages for the death of a passenger, and the respective rights of those suing, were intertwined with the types of recoverable compensatory damages. The same problems encountered by the delegates in addressing the question of who can sue arose in attempting to address the question of what damages can be recovered—it was considered impossible to set in a single formula the various legal concepts of the national laws of the various parties to the Convention. *Korean Air II*, 932 F.2d at 1488-89. In fact, all attempts to insert a conflict of law damage rule in the Convention failed, so that even the question of which law shall apply was left to be gov-

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[21] One commentator has observed that the drafters of the Convention considered the right to sue in death cases as a question of substantive law and not merely a procedural question. *Haanappel* at 67. Moreover, Article 28(2) specifically addresses procedural questions and defers their resolution to domestic law. App. 2a.

erned by the national law of the parties. Thus, "the Convention provides neither for a substantive rule of law nor for a choice of law rule. . . . for the meaning of the word 'damage' in Article 17. . . ." *Haanappel* at 66.[22]

In the draft of the Warsaw Convention presented to the Third Session of CITEJA in May 1928, the provision (draft Article 27) that is now Article 24, provided:

> In the event of death of the holder of the right, any action in liability, however founded, can be exercised . . . by the persons to whom this action belongs according to the national law of the deceased or, in the absence hereof [sic], according to the law of his last domicile.

CITEJA Report, 3d Session, May 1928, at 114, *quoted in Lockerbie I*, 928 F.2d at 1284.

The CITEJA Report of May 15, 1928 stated:

> In the event of the death of the party legally representing the estate, any action, of whatever nature whatsoever, may be brought by those persons to whom such action pertains in accordance with the law of the nation of the deceased or, in the absence thereof, in accordance with that of his last domicile. But such action can only be exercised under the conditions and within the limitations which are provided for by the convention.
>
> These provisions have the specific purpose of impeding persons who claim to have the right to bring actions outside of the convention; all of them have to adhere to the limitations of this convention.

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[22] A similar problem was encountered in the drafting of other international liability conventions. For example, neither the Treaty of Rome 1933 (drafted by the same individuals in CITEJA and during the same period of time as the Warsaw Convention), which relates to injuries caused to third-parties on the ground by falling objects from the air, nor the Bern Convention 1924, which relates to international rail transportation, contains provisions specifying the types of damages recoverable. The issue is left to the national laws of each contracting nation. *Drion* at ¶¶ 111-112; *Ars Aequi* at 18-19.

> The question has been posed *in this regard as to whether one might define the category of damages which is susceptible to compensation.*
>
> Although this question has appeared to be a very interesting one, a satisfactory solution has not been possible to be found prior to knowing exactly the bodies of statutory law of the various countries. *It is understood that the question is to be studied subsequently when the point is clarified on determining which persons, according to the laws of the various nations, have the right to exercise an action* against the carrier.

Report of Second Commission by Henry de Vos, CITEJA Reporter (May 15, 1928), in CITEJA Report, 3d Session at 106 (May 1928) (emphasis added) (App. 8a-9a).

The final result of CITEJA's studies "led the drafters to abandon the choice of law rule favoring the decedent's domicile, thus leaving both the choice of law and the question of the rights of legal claimants to 'general principles of private international law and to the internal legislation of States.' " *Lockerbie I*, 928 F.2d at 1285.

The choice of law provision in the draft Article 27 was deleted and the Article was renumbered Article 24. *1929 Warsaw Minutes* at 265.

The CITEJA Report which accompanied the 1929 draft, stated:

> The question was asked of knowing if one could determine who the persons upon whom the action devolves in the case of death are, and what are the damages subject to reparation. It was not possible to find a satisfactory solution to this double problem, and the CITEJA esteemed that this question of private international law should be regulated independantly [sic] from the present Convention.

1929 Warsaw Minutes at 255 (Report of the Third Session of CITEJA by Henry de Vos (Sept. 15 1928)).

At the 1929 Warsaw Conference, the German delegation submitted a proposal that the Convention expressly leave the issues of standing and what are the rights of the claimants in death cases to the domestic law of each contracting party. *1929 Warsaw Minutes* at 58, 169, 211-214, 289-90 (proposal of German delegation). The proposal was accepted and included in Article 24(2) without debate. *Id.*

Article 24 as adopted has been interpreted by all courts and commentators to mean that "the proper 'measure' of damages recoverable under Article 17 is left to the domestic law of the contracting states." *Korean Air II*, 932 F.2d at 1488; *Lockerbie I*, 928 F.2d at 1274-83; *Harris*, 820 F.2d at 1002; *Mexico City*, 708 F.2d at 415. *see Drion* at ¶¶ 111-112; *Goedhuis* at 269-71; *Ars Aequi* at 17; *Mankiewicz* at 155-56; *G. Miller* at 115-17, 125.

The post-1929 conduct of the contracting parties confirms that the types of recoverable compensatory damages in a Convention case are to be determined by the national laws of each contracting party.[23] For example, Australia, Canada, England, Germany and the Netherlands adopted domestic legislation implementing the Convention and setting forth the types of damages recoverable in a Convention case, standing to sue and/or the proper beneficiaries of the wrongful death action. *See Haanappel*, 6 Air L. at 70-76; Giemulla, Schmid & Ehlers, *Warsaw Convention* 33-40 (Kluwer 1992); P. Martin, *et al.*, *Shawcross & Beaumont: Air Law*, ¶ VII (71) (4th ed. 1993); Sand, *Limitations of Liability and Passenger Accident Compensation Under the Warsaw Convention*, 11 Am. J. Comp. L. 21, 30 (1962). The Court in *Dame Surprenant v. Air Canada*, 1973 C.A. Quebec 107, 117-18, 126-27 (Ct. App. Quebec 1973), interpreting the Convention to defer to local law the issue of recoverable damages, rejected an argument that "dommage" in Article 17 allows for nonpecuniary damages without reference to Quebec law, which precludes such

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[23] The Court previously has noted the relevance of "post-1929 'conduct' and 'interpretation' of the signatories" in determining the intended meaning of the Convention. *Floyd*, 499 U.S. at 546-47.

damages. *Cf. Preston v. Hunting Air Transport*, 1956 U.S. Av. Cas. 1 (Q.B. 1956)(England) ("damage sustained" allows loss of parental nurture under English law).

Plaintiffs assert that deferring to domestic law to determine the elements of recoverable damages under the Convention would "frustrate" the Convention's "goal" of uniformity. Plaintiffs' Brief at 16-17. However, the language of the Convention and the drafting history detailed above, demonstrate that the drafters, unable to find an acceptable uniform standard for the types of recoverable compensatory damages, due to the differing prevailing national damage rules, intentionally left the matter for determination by reference to the national law of each contracting party. *Korean Air II*, 932 F.2d at 1488-89; *Drion* at ¶¶ 111-112; *see supra* at 16-20. Professor Mankiewicz, a leading Warsaw Convention scholar, explains that the reason the Convention does not contain a uniform rule as to recoverable damages "is evident":

> In 1929 many countries, particularly amongst the common law countries, had no rules on the survival of contractual rights, and wrongful death statutes, where they existed, varied greatly in scope and substance, i.e. with respect to the "persons who have the right to bring suit" and "their respective rights". In a matter so intimately intertwined with the national particularities of tort and family law, any attempt at unification of these rules was bound to lead nowhere.

R. Mankiewicz, *The Gap in Article 24(2) of the Warsaw Convention* at 88 in *Mensch und Luftfahrt*, Erinnerungs-schrift Guldimann (Bern 1981); *see G. Miller*, at 125 ("unification of the rules governing air carriage achieved by the Convention" does not extend to types of recoverable damages).

The overall Convention goal of uniformity as to liability rules does not and never was contemplated by the parties to include the types of recoverable damages in an action governed by the Convention.

The plain language of Articles 17 and 24(2) of the Convention, read together, leaves the determination of the types of recoverable "compensatory damages" to national law. The issue then becomes, simply, what types of compensatory damages are recoverable under the applicable national law of the contracting parties. This is a domestic choice of law issue for each party to the Convention. *See, e.g., Harris*, 820 F.2d at 1002; *Mertens*, 341 F.2d at 855; *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266, 275 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965); *G. Miller* at 115-17, 125. If the applicable national law allows for, or precludes, the recovery of certain types of compensatory damages, such damages are recoverable or are not recoverable solely on the basis of the relevant national law and not upon the basis of the phrase "damage sustained" as used in Article 17.

II

THE DEATH ON THE HIGH SEAS ACT IS THE NATIONAL LAW PRESCRIBING THE TYPES OF RECOVERABLE DAMAGES IN THIS CASE

The Court of Appeals below, having correctly concluded that the Warsaw Convention defers the issue of recoverable damages to national law, then was faced with the issue of "which federal law to apply" to determine whether loss of society damages are recoverable for an Article 17 passenger death occurring on the high seas.[24] A6.

However, the court below erred in its choice of federal law for an Article 17 death occurring on the high seas and then compounded the error by misinterpreting the federal law that it chose to apply.

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[24] All Parties and *Amici* agree that the relevant internal substantive law to be applied in the United States to the issues not addressed by the Convention is federal and not state law, because it would make little sense to adopt state law in giving meaning to the Convention. *Lockerbie I*, 928 F.2d at 1274, 1279. *Cf. Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) (state law not applicable to high seas).

A. DOHSA Is the Applicable National Law and Precludes Recovery of Loss of Society Damages

1. DOHSA Applies to Aircraft Accidents

Where a fatal accident occurs on the high seas, more than a marine league from the shore of any State or Territory of the United States, the directly applicable federal wrongful death statute is DOHSA. 46 U.S.C. App. § 761 (App. 3a); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 209, 232 (1986); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624 n.18, 625 (1978).

Courts have recognized for over 50 years that if the location of an aircraft accident satisfies the requirements of § 761 of DOHSA, then DOHSA applies to a death action brought as a result of the accident. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 271-72 & n.20 (1972); *Miller v. United States*, 725 F.2d 1311, 1314-25 (11th Cir.), *cert. denied*, 469 U.S. 821 (1984); *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 635 (8th Cir. 1972); *D'Aleman v. Pan American World Airways*, 259 F.2d 493, 494-95 (2d Cir. 1958); *Choy v. Pan American Airways*, 1 Av. Cas. (CCH) 947, 1942 A.M.C. 483 (S.D.N.Y. 1941).[25]

The Court in *Executive Jet*, 409 U.S. at 263-64, recognized the applicability of DOHSA to aircraft accidents on the high seas:

> Since *Choy*, many actions for wrongful death arising out of aircraft crashes into the high seas beyond one marine league from shore have been brought under the Death on the High Seas Act, and federal jurisdiction has consistently been sustained in those cases. [footnote cit-

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[25] Moreover, § 761 refers to the site of an accident on the high seas, not where the death occurs or where the wrongful act causing the accident may have originated. *Gaudet*, 414 U.S. at 599-600 (Powell, J., dissenting on other grounds); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1348 (9th Cir. 1987), *modified on other grounds*, 866 F.2d 318 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989); *Lacey v. L.W. Wiggins Airways, Inc.*, 95 F. Supp. 916, 918 (D. Mass. 1951).

> ing cases omitted] Indeed, it may be considered as settled that [DOHSA] gives the federal admiralty courts jurisdiction of such wrongful-death actions.

Id. at 263-64. *See Tallentire*, 477 U.S. at 218-19 (even without DOHSA, "admiralty jurisdiction is appropriately invoked here under traditional principles because the [helicopter] accident occurred on the high seas and in furtherance of . . . a traditional maritime activity. . . . the ferrying of passengers. . . ."); *Higginbotham*, 436 U.S. at 623 (applying DOHSA to helicopter crash on high seas).

It is not disputed in this case that the Article 17 accident resulting in the death of the decedent occurred on the high seas within the scope of DOHSA. J.A. 29.[26]

2. DOHSA Precludes the Recovery of Loss of Society Damages

Section 762 of DOHSA expressly limits the recovery of damages to "fair and just compensation for the *pecuniary loss* sustained." App. 3a. The Court has interpreted this provision to impose an absolute prohibition on the recovery of nonpecuniary damages for loss of society for any death occurring on the high seas, regardless of whether the action is based on state law or general maritime law. *Tallentire*, 477 U.S. at 209; *Higginbotham*, 436 U.S. at 623-625.

B. The Decision Of the Court Below Allowing the Recovery of Loss of Society Damages Is Contrary to DOHSA and General Maritime Law

Although the death of the decedent in this case occurred on the high seas within the meaning of DOHSA, the court below rejected DOHSA in allowing the recovery of loss of society

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[26] Moreover, KAL flight KE007 "was engaged in a function traditionally performed by water-borne vessels: the ferrying of passengers" from the mainland over the high seas to another land mass. *Tallentire*, 477 U.S. at 219. Travel from Anchorage to Korea "would, of necessity, have to be accomplished by ship but for the introduction of the airplane into this forum." *Miller v. United States*, 725 F.2d at 1315.

damages. A5-6. The court did not do this because it considered that it was required to do so by the Convention. Rather, the overriding reason was the desire of the court below to adopt the same rule for Warsaw Convention aircraft accidents occurring on the high seas as was adopted by the same court earlier for Warsaw Convention aircraft accidents occurring on land. In *Lockerbie II*, the Court of Appeals had extended the general maritime law principles of *Gaudet* to land-based Warsaw Convention passenger death actions to allow for the recovery of loss of society damages. The court below appears to have viewed DOHSA as an obstacle to its desired goal of uniformity and, therefore, simply rejected DOHSA in favor of the general maritime law principles of *Gaudet*. In this the court below erred.

The court below premised its rejection of DOHSA on the finding of two "conflicts": (1) that "[a]dopting one rule for Convention cases involving accidents over land and another for accidents over water would defeat" the judicial desire for a uniform damage law to govern all Warsaw Convention cases, and (2) DOHSA's pecuniary loss provisions cannot be reconciled with the " 'aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention,'. . . including non-pecuniary loss." A5-6. Plaintiffs argue that, on the basis of these judicially perceived conflicts, DOHSA is inapplicable in this case. Plaintiffs' Brief at 17-19.

1. There Is No Conflict Between the Warsaw Convention and DOHSA

Prior to the KAL litigation, no court had found that the damage provisions of DOHSA conflict with the Warsaw Convention.[27] Indeed, prior to the general acceptance by the courts that Article 17 of the Convention creates a wrongful

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[27] *See In re Air Crash Disaster Near Honolulu, Hawaii, on Feb. 24, 1989*, 783 F. Supp. 1261, 1265 (N.D. Cal. 1992); *Park v. Korean Air Lines*, 24 Av. Cas. (CCH) 17,253, 17,258 (S.D.N.Y. 1992) (Buchwald, M.J.); *see also Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965).

death cause of action, DOHSA was considered as the basis upon which to seek recovery for a passenger death occurring on the high seas during Warsaw Convention transportation.[28]

While in the event of a *direct* conflict between a statute and a treaty[29], the later in time prevails, it prevails only to the extent necessary to resolve the conflict. *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). This is because a court should never interpret one as preempting the other, but rather "will always endeavor to construe them so as to give effect to both." *Whitney*, 124 U.S. at 194; *see Frost v. Wenie*, 157 U.S. 46, 58-89 (1895).

In this case, there is no conflict between DOHSA and the Warsaw Convention. DOHSA and the Convention complement each other. DOHSA addresses the very issue which the drafters of the Convention left to be resolved by the national law of the contracting parties. The conflicts found by the court below and asserted by Plaintiffs simply do not exist and are themselves in conflict with the goals of the Convention and the expectations of the contracting parties.

a. The Desire of the Court Below for Uniformity Cannot Override DOHSA

The first conflict created by the court below is not a conflict between DOHSA and the Convention, but represents a conflict between DOHSA and the court's desire for uniformity in recoverable damages in all Warsaw Convention cases.

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[28] *See Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957), *aff'g*, 154 F. Supp. 162 (S.D.N.Y. 1956), *cert. denied*, 355 U.S. 907 (1957); *Pardonnet v. Flying Tiger Line, Inc.*, 233 F. Supp. 683 (N.D. Ill. 1964); *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874, 875-76 (W.D. Pa. 1965); *Wyman v. Pan American World Airways*, 181 Misc. 963, 43 N.Y.S.2d 420 (N.Y. Sup. Ct. 1943), *aff'd*, 267 A.D. 947, 48 N.Y.S.2d 459 (1st Dep't), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785 (1944); *see also G. Calkins*, 26 J. Air L. & Com. at 340-41; *Haanappel*, 6 Air L. at 69 n.23 & 76 n.95.

[29] Treaties and statutes are of equal force and effect. U.S. Const. art. VI, cl. 2; *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

However, the desire of the court below for such uniformity is not a Convention goal and cannot serve as a basis to override DOHSA. *See Higginbotham*, 436 U.S. at 624; *Park v. Korean Air Lines*, 24 Av. Cas. (CCH) 17,253, 17,258 n.12 (S.D.N.Y. 1992).

The Court rejected a similar desire for judicial uniformity as an acceptable rationale for overriding DOHSA in *Higginbotham*. As to the difference between the recovery of loss of society damages for a death on the high seas (not allowed by DOHSA) and in territorial waters (allowed by the general maritime law principles of *Gaudet*)[30], the Court stated:

> We recognize today, as we did in *Moragne*, the value of uniformity, but a ruling that DOHSA governs wrongful-death recoveries on the high seas poses only a minor threat to uniformity of maritime law . . . . As *Moragne* itself implied, *DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy*, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right. It is true that the measures of damages in coastal waters will differ from the high seas, but *even if this difference proves to be significant, a desire for uniformity cannot override the statute.*

Higginbotham, 436 U.S. at 624 (emphasis added and footnotes omitted). *Accord Miles*, 498 U.S. at 33; *Tallentire*, 477 U.S. at 233; *Park*, 24 Av. Cas. (CCH) 17,253 at 17,258 n.12.

In *Tallentire*, the Court held that the pecuniary remedies of DOHSA were exclusive and preempted a state wrongful death statute permitting the recovery of nonpecuniary damages for loss of society. 477 U.S. at 230-33. The Court reaffirmed the preclusive effect of DOHSA and again rejected the argument

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[30] The Court did not consider its holding to pose a significant threat to uniformity because loss of society damages were viewed as purely "symbolic" and not the primary element of damage. *See Higginbotham*, 436 U.S. at 624-25 & n. 20.

that a desire for uniformity may serve as the basis for allowing loss of society damages in disregard of DOHSA. 477 U.S. at 233.

The first conflict created by the court below, a judicial desire for uniformity, was resolved by the Court in favor of DOHSA in *Miles*, *Tallentire* and *Higginbotham*. The court below chose a different path in disregard of DOHSA and the teachings of the Court. In this, the court below erred and should be reversed.

b. The Unavailability of Loss of Society Damages Under National Law Does Not Conflict With Any Goal of the Warsaw Convention

The second conflict created by the court below was a perceived conflict between DOHSA's pecuniary loss provision and the " 'aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention,'. . . including non-pecuniary loss." A6 (quoting *Lockerbie II*, 37 F.3d at 829 (citing *Korean Air II*, 932 F.2d at 1486-87 and *Lockerbie I*, 928 F.2d at 1281)).[31]

In creating this "conflict", the court below made two assumptions: (1) that the aim of the Convention was to provide recovery of "full" compensatory damages, including non-pecuniary losses and (2) that loss of society damages are a necessary element of a "full" recovery. Both assumptions are unfounded.[32]

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[31] This rationale was not a part of the original opinion issued by the court below on November 3, 1994, which allowed loss of society damages, but was included in the amended opinion issued on December 5, 1994, evidently in response to KAL's argument in its rehearing petition that the court was required to give effect both to DOHSA and the Convention to the extent that they do not conflict. *See Zicherman*, 1994 Westlaw 606516 at 3 (J.A. 104).

[32] The court below cited as support *Lockerbie II*, 37 F.3d at 829, which in turn cited *Lockerbie I*, 928 F.2d at 1281 and *Korean Air II*, 932 F.2d at 1486-87. A6. These decisions did not recognize any such goal in the Convention. *Lockerbie II* merely stated that the Convention *itself*

The Court has recognized that "the primary purpose of the contracting parties to the Convention [was]: *limiting the liability of air carriers* in order to foster the growth of the fledgling commercial aviation industry. . . ." *Floyd*, 499 U.S. at 546 (emphasis added); *see Trans World Air Lines v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984). The Court in *Floyd* stated:

> Whatever may be the current view among Convention signatories, *in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers*, ...

Floyd, 499 U.S. at 546 (emphasis added).[33]

A national law precluding the recovery of loss of society damages (DOHSA) cannot be said to conflict with any goal of the Convention, when the drafters expressly left the determination of the types of recoverable damages to the national law of each contracting party.

Under DOHSA and other federal wrongful death statutes, the recovery of pecuniary damages is the intended full recovery. The fact that certain elements of damage may not be recognized under the laws of a particular nation or state, does not render the recovery incomplete—the prescribed recoverable damage is the "full" or "complete" recovery under the applicable national law. Thus, there is nothing inherent in the preclusion of loss of society damages by DOHSA that con-

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places no restrictions on the *types* of "compensatory damages" and, therefore, "compensatory damages" recognized by the applicable national law of the contracting party may be recovered. The referenced portion of *Korean Air II* and *Lockerbie I* relates to a discussion that the Article 17 phrase "damage sustained" is compensatory and not punitive in nature, and thus precludes the recovery of punitive damages in a Warsaw Convention case.

[33] Plaintiffs' argument that the drafters made a deliberate choice to limit liability by imposition of a cap on recoverable damages in Article 22, rather than to "limit" the types of recoverable damages, is meritless and is not supported by the drafting history of the Convention. Plaintiffs' Brief at 11-12.

flicts with any goal, term or provision of the Convention or the intent and expectations of the Parties.[34]

None of the "conflicts" created and perceived by the court below exist. None can justify the rejection of DOHSA as the applicable national law on recoverable damages in this case.

2. Neither *Gaudet* Nor Federal Common Law Preempts DOHSA

The only conflict that might exist is between the general maritime law principles of *Gaudet* and DOHSA. Even the court below recognized the issue before it to be "which federal law to apply"—DOHSA or *Gaudet*. A6. The same basic conflict was addressed by the Court in *Higginbotham*—do the general maritime law principles of *Gaudet* extend to the high seas to allow recovery of loss of society damages? The Court in *Higginbotham* said no. The court below said yes.

Plaintiffs and *Amici* also reject DOHSA and, to varying degrees, general maritime law, as the applicable national law. They argue that the Court should look to federal common law, which, according to them, allows for the recovery of loss of society damages. Plaintiffs' Brief at 19-21; *Lockerbie Amicus Brief* at 12-22; *KAL Amicus Brief* at 19-22.

In rejecting DOHSA in favor of *Gaudet* or federal common law, neither the court below, plaintiffs nor *Amici*, adequately address the threshold issue of how a directly applicable federal statute, such as DOHSA, can be preempted by either the general maritime law principles of *Gaudet* or any notion of federal common law.

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[34] Plaintiffs' related argument that loss of society damages must be allowed in order to "deter" wilful misconduct disregards the nature of loss of society damages. Plaintiffs' Brief at 13-14. The function of loss of society damages, where allowed, is to compensate and *not* to punish or deter. Deterrence and punishment is the function of punitive damages, which the courts have held are not recoverable under the Convention. *Cf. Korean Air II*, 932 F.2d at 1489-91. *Drion*, at 211. In any event, the same types of compensatory damages are recoverable in a Warsaw Convention action, regardless of whether the Article 22 liability limit on recoverable damages applies or not.

a. *Gaudet* Does Not Extend to the High Seas

Gaudet dealt with the recovery of loss of society damages in a *Moragne*[35] death action by the dependent wife of a longshoreman killed in the territorial waters of the United States. The Court in *Gaudet* made a "policy determination that differed from the choice made by Congress"[36] in DOHSA and concluded that nonpecuniary damages for loss of society were available in a *Moragne* action for the death of a longshoreman in territorial waters. *Gaudet*, 414 U.S. at 585-91.

Later, in *Higginbotham*, a general maritime law and DOHSA action for the deaths of passengers arising out of a helicopter crash on the high seas, the Court addressed the effect of *Gaudet* where DOHSA applied. The Court first noted that *Gaudet* was broadly written and applied only to territorial waters and not to the high seas. *Id.* The question that the Court addressed in *Higginbotham*, therefore, was "which measure of damages to apply in a death action arising on the high seas—the rule chosen by Congress in 1920 [DOHSA] or the rule chosen by this Court in *Gaudet*." 436 U.S. at 623. The Court chose DOHSA. The Court found that Congress had made the choice for the Court in 1920 by limiting recoverable damages in DOHSA to pecuniary losses. Therefore, the recovery of loss of society damages under general maritime law was foreclosed by Congress in DOHSA. 436 U.S. at 623-25.

Higginbotham, as this case, involved the deaths of aviation passengers occurring on the high seas and the question whether to apply DOHSA or *Gaudet* in determining whether loss of society damages are recoverable. The court below chose to ignore *Higginbotham*, reject DOHSA and follow *Gaudet* as the applicable damage law for an aviation passenger killed on the high seas.

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[35] The Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), recognized a general maritime wrongful death cause of action based on unseaworthiness for the death of a longshoreman killed in territorial waters.

[36] *Higginbotham*, 436 U.S. at 622.

The principles of *Higginbotham* were reiterated by the Court in *Miles*, when the Court rejected an attempt to supplement the pecuniary damages available under the Jones Act with nonpecuniary damages for loss of society under the principles of *Gaudet*. *Miles*, 498 U.S. at 27-33. The Court emphasized the overriding preeminence of federal legislation on the subject and that a court cannot allow for recovery of damages under general maritime law which are not allowed by an applicable federal statute. *Id.*

Miles and *Higginbotham* make clear that, while a general maritime law death action may be pursued in conjunction with a statutory DOHSA or Jones Act action, the damages available under general maritime law cannot differ from or supplement the damages allowed by a federal statute. For this reason, no Circuit Court of Appeals, other than the court below, has disregarded DOHSA or permitted the recovery of loss of society damages for a death on the high seas under the general maritime law principles of *Gaudet*.

b. Federal Common Law Does Not Preempt DOHSA

Plaintiffs and *Amici* argue that loss of society damages are recoverable under federal common law, regardless of *Gaudet*. Even if federal common law recognizes loss of society damages, which it does not (*see infra* at Point III), it cannot serve to supplement or preempt the damages allowed by a directly applicable federal statute, such as DOHSA, any more than general maritime law can.

Federal common law is merely a necessary expedient "resorted to 'in the absence of an applicable Act of Congress' " when federal courts are forced to resolve issues which cannot be answered by or with reference to federal statutes alone. *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)); *see Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). "Where a congressional scheme speaks directly to a question which would otherwise be answered by federal common law,

federal legislation 'preempts' federal common law." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984) (footnote omitted).

The rationale of *Higginbotham* and *Miles* is equally applicable to the arguments of Plaintiffs and *Amici* that federal common law controls. If a court were to supplement DOHSA with loss of society damages under federal common law, the court would be "rewriting rules that Congress has affirmatively and specifically enacted," by creating an entirely "different measure of damages", which Congress chose not to create and which the Court consistently has rejected in applying the Acts of Congress. *Higginbotham*, 436 U.S. at 625; *see Miles*, 498 U.S. at 31-33; *Tallentire*, 477 U.S. at 230-32; *Milwaukee*, 451 U.S. at 314.

As a statutory enactment expressly applicable to all deaths occurring on the high seas, DOHSA cannot be preempted or supplemented by *Gaudet* or federal common law.

III

LOSS OF SOCIETY DAMAGES ARE NOT RECOVERABLE UNDER GENERAL MARITIME LAW OR FEDERAL COMMON LAW

The driving force of the decision of the court below and the arguments of Plaintiffs and *Amici* is that there should be one uniform "federal" rule as to recoverable damages applicable to all Warsaw Convention cases in the United States. While uniformity in the types of recoverable compensatory damages in all Warsaw Convention cases in the United States may be a valid goal, a uniform rule cannot be chosen which is in complete disregard of a directly applicable federal statute, such as DOHSA. *Higginbotham*, 436 U.S. at 624.

The court below adopted general maritime law as the best source of federal common law. A5. Plaintiffs and *Amici*, to varying degrees, reject general maritime law as a source of law and argue that loss of society damages should be allowed

under "federal common law", derived from state law or civil rights cases. They reject DOHSA and other federal wrongful death statutes as the proper source for the development of a federal common law rule of recoverable damages in wrongful death actions. Plaintiffs' Brief at 17-22; *Lockerbie Amicus Brief* at 23-26; *KAL Amicus Brief* at 17-22.

If the Court desires to enunciate a uniform federal damage rule for all Warsaw Convention death actions, such a rule should be fashioned from DOHSA, general maritime law or other federal wrongful death acts, such as the Jones Act, 46 U.S.C. App. § 688, or Federal Employers' Liability Act (FELA), 45 U.S.C. App. §§ 51-59. For aircraft accidents on the high seas resulting in the deaths of passengers, DOHSA applies and must be the rule. For accidents over land, where there is no directly applicable federal wrongful death statute, adopting DOHSA as the appropriate analog would be consistent with all other federal wrongful death statutes. Any other rule would necessarily ignore DOHSA and the express policy of Congress in this area of the law. If uniformity consistent with federal law is truly to be achieved, recoverable damages in all Warsaw Convention cases under a "federal common law" should correspond to the damage rule of DOHSA.

Accordingly, whether the Court looks to general maritime law or federal statutes for a uniform Warsaw Convention rule on recoverable compensatory damages, the result is the same—loss of society damages are not allowed.

A. Loss of Society Damages Are Not Recoverable Under General Maritime Law No Matter Where the Death Occurs

The court below correctly recognized that the best source of federal common law is general maritime law[37], but erred in

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[37] *See Sample v. Johnson*, 771 F.2d 1335, 1345 (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *Gillespie v. U.S. Steel Corp.*, 321 F.2d 518, 531 (6th Cir. 1963), *aff'd in relevant part*, 379 U.S. 148

choosing *Gaudet* as a current and valid representation of general maritime law. Plaintiffs and *Amici* reject the relevancy of general maritime law, except to the extent of agreeing with *Gaudet*. The decision of the court below and the arguments advanced by Plaintiffs and *Amici* based on *Gaudet*, overlook the development of general maritime law, culminating in *Miles*, which has rendered *Gaudet* meaningless.

Prior to the Court's decision in *Moragne v. State Marine Lines*, 398 U.S. 375 (1970), no general maritime law right of action for wrongful death existed. The Court in *Moragne* overruled *The Harrisburg*, 119 U.S. 199 (1886)[38], and recognized a general maritime law cause of action for wrongful death based on unseaworthiness for the death of a longshoreman killed in state territorial waters. While the Court did not define the types of damages recoverable (*Moragne*, 398 U.S. at 408), the Court did set forth two broad principles to guide lower courts in determining the scope of the *Moragne* action. The first was uniformity in federal maritime law (*Id.* at 401), and the second was to accord "special solicitude" to those persons who come within the admiralty jurisdiction of the federal courts. *Id.* at 387.

The first case in which the Court addressed the substantive content of the *Moragne* cause of action was *Gaudet*, 414 U.S. 573 (1974). The Court in *Gaudet* permitted the dependent spouse of a longshoreman killed in state territorial waters to recover damages for loss of society. *Id.* at 585.[39]

(1964); *Eichler v. Lufthansa German Airlines*, 794 F. Supp. 127, 130 (S.D.N.Y. 1992).

[38] The Court in *The Harrisburg* had held that maritime law does not afford a cause of action for wrongful death.

[39] The holding of *Gaudet* was extended in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), to include dependents of injured longshoremen. *Alvez* has been rejected by lower courts. *See Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 201-02 (1st Cir. 1994); *Murray v. Anthony J. Bertucci Const. Co.*, 958 F.2d 127, 131 (5th Cir.), *cert. denied*, 113 S. Ct. 190 (1992).

The Court placed the first limit on the scope of the *Gaudet* ruling in *Higginbotham*, 436 U.S. 618 (1978), when the Court declined to award loss of society damages to dependents of aviation passengers killed on the high seas. The Court reasoned that DOHSA expressly limits damages to pecuniary loss, thereby precluding the Court from reading into the statute recovery for nonpecuniary losses for a death occurring on the high seas. *Id.* at 625-26. In so doing, the Court recognized that *Gaudet* was broadly written and limited *Gaudet*'s holding to territorial waters. *Id. Higginbotham*, however, created an inconsistency in the general maritime law: loss of society damages were recoverable for a death in state territorial waters under *Gaudet*, but were unavailable for a death on the high seas under DOHSA. The Court recognized this inconsistency, but held that "DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy" and the need for uniformity cannot override a statute.[40] The inconsistency, of course, was not actually created by *Higginbotham*, as the Court there followed DOHSA; the inconsistency was created by *Gaudet*.[41]

The Court limited *Gaudet* further in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), where the Court again addressed the conflict between *Gaudet* and a federal maritime statute. In *Miles*, the Court held that nondependents of a Jones Act seaman may not recover loss of society damages under general maritime law. The Court expressed a strong policy for restoring uniformity in the types of recoverable damages in federal law based cases, regardless of whether the action is brought under DOHSA, the Jones Act, or general maritime law. *Miles*,

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40 *See Tallentire*, 477 U.S. at 230-32 (DOHSA's pecuniary remedies were exclusive and preempted a state wrongful death statute permitting the recovery of damages for loss of society).

41 As the Third Circuit recently stated: "*Gaudet* (together with its offspring, *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980)) represents the first, and last, time that the Court departed from the guidance of federal statutory wrongful death remedies in shaping recovery for wrongful death." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 634 (3d Cir. 1994), *cert. granted*, 115 S. Ct. 1998 (1995).

498 U.S. at 27-33 ("Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.").

Relying on *Moragne*, the Court in *Miles* also reaffirmed the principle that federal maritime statutes "both direct and delimit" the actions of the courts, and that courts must look "primarily" to DOHSA and the Jones Act for guidance in determining whether to award loss of society damages, so that the nature of recoverable damages remains uniform, no matter where the death occurs. 498 U.S. at 27, 30-33. For this reason, the Court in *Miles* emphasized that "[t]he holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen." *Miles*, 498 U.S. at 31; *see Higginbotham*, 436 U.S. at 623.

This statement of the Court is significant, in view of the fact that the cause of action for which *Gaudet* created a remedy was statutorily eliminated by the 1972 amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq. Miles*, 498 U.S. at 28. In the view of one Court of Appeals, *Gaudet* "has therefore been condemned to a kind of legal limbo; limited to its facts, inapplicable on its facts, yet not overruled." *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993).[42] The court in *Miller* may even have overstated the vitality of *Gaudet* after *Miles*, since the Court expressly declined to limit *Moragne* to its facts, because it "would no longer have any applicability at all" after the 1972 amendments to the LHWCA, but had no hesitancy in limiting *Gaudet* to its narrow facts. *Miles*, 498 U.S. at 28, 31.

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[42] *See Calhoun*, 40 F.3d at 634 (the Supreme Court "has narrowed [*Gaudet*] to its facts so that the decision may be, for all intents and purposes, a dead letter"); *see also Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1090-92 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994); *Murray*, 958 F.2d at 130-31.

The three basic principles underlying the decisions of the Court in *Moragne*, *Higginbotham*, *Tallentire* and *Miles* may be stated as follows:

1. Uniformity in the type of recoverable damages in a maritime wrongful death action, whether based on a federal statute or federal common law, is the controlling factor in determining whether certain types of damages, such as loss of society, are recoverable;

2. To ensure uniformity, the maritime statutes are to be the primary policy guide in developing general maritime law; and

3. General maritime law may supplement the statutory remedies created by Congress only "where so doing would achieve the uniform vindication of the statutory policies," *i.e.*, the courts must act "strictly within the limits imposed by Congress." *Miles*, 498 U.S. at 27.[43]

After *Miles*, lower courts have recognized that "uniformity" in maritime law should determine whether damages, such as loss of society, are recoverable, no matter where the injury or death occurs. *See Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1407-08 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995); *Kelly v. Panama Canal Commission*, 26 F.3d 597, 601-602 (5th Cir. 1994); *Nichols v. Petroleum Helicopters*, 17 F.3d 119, 122-23 (5th Cir. 1994); *Horsley*, 15 F.3d at 201-02; *Walker v. Braus*, 995 F.2d 77, 82 (5th Cir. 1993), *on remand*, 861 F. Supp. 527, 534-37 (E.D. La. 1994) (citing cases); *Miller*, 989 F.2d at 1458-59; *Smallwood v. American Trading & Transp. Co.*, 839 F. Supp. 1377, 1385 (N.D. Cal. 1993).

While the implication of the limits imposed upon *Gaudet* by the Court in *Higginbotham* and *Miles* are clear, lower courts have shown a reluctance to enforce those limits strictly,

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[43] *Miles* also appears to represent a doctrinal shift away from a broad reading of "special solicitude" and toward a more narrow one. The Court indicated in *Miles* that uniformity in maritime law requires that those who sue under general maritime law receive no more "solicitude" than those who sue under DOHSA or the Jones Act. *Miles*, 498 U.S. at 30-33.

since *Gaudet* has not been expressly overruled. *See Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994); *Nichols*, 17 F.3d at 122-23; *cf. Randall v. Chevron U.S.A.*, 13 F.3d 888 (5th Cir.), *modified*, 22 F.3d 568 (5th Cir.), *cert. denied*, 115 S. Ct. 498 (1994). This has resulted in conflicting decisions and improper extensions of *Gaudet* by lower courts, as evidenced by the decision of the court below and by *Lockerbie II*.

In resurrecting *Gaudet* and extending it not only inland (*Lockerbie II*), but to the high seas (*Zicherman*), the Second Circuit evidently has rejected *Miles* and *Higginbotham* and would limit their applicability only to cases brought under the Jones Act and DOHSA. *Zicherman*, 43 F.3d at 21 (A5); *Lockerbie II*, 37 F.3d at 829. The court below and in *Lockerbie II*, erroneously viewed general maritime law as being separate and independent from federal maritime statutes. This view disregards the directions of the Court in *Miles* and *Higginbotham* that a court cannot disassociate federal maritime statutes from the general maritime law, because the maritime statutes are the primary guide in defining general maritime law. A5-6.

As a result of its misapprehension of general maritime law, the court below has created the very disunity that the Court sought to eliminate in *Miles*. The ripple effect of the extension of *Gaudet* by the court below and in *Lockerbie II* already has reached the general maritime law outside the context of the Warsaw Convention. *See Saunders v. Cunard Line Ltd.*, 1995 Westlaw 329323 (S.D.N.Y. June 1, 1995) (relying on *Lockerbie II*, court held loss of society allowed for personal injury in territorial waters); *compare Sutton*, 26 F.3d at 903 with *Horsley*, 15 F.3d at 201, *Wahlstrom*, 4 F.3d at 1091-93, *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) and *Murray*, 958 F.2d at 130-31.

The problem began and still lies with *Gaudet*, which now stands as the *sole* source of confusion and disunity in the determination of damages recoverable under general maritime law. *Gaudet* no longer can be regarded as a valid representation of the general maritime law of the United States. In

order to ensure uniformity in the maritime law, in accordance with the congressional enactments, the Court should make clear what was implicit in *Miles* and expressly overrule *Gaudet*.

Contrary to the holding of the court below, loss of society damages simply are not recoverable under any principle of general maritime law, no matter where the death occurs.

B. No Federal Wrongful Death Statute Allows for the Recovery of Loss of Society Damages

Federal statutes dealing with similar subject matter are a prime repository of federal policy on a related subject and serve as the starting point for ascertaining federal common law. *Milwaukee*, 409 U.S. at 312-18; *see Miles*, 498 U.S. at 24. This is especially true in the case of wrongful death, because there is no general federal wrongful death action outside of admiralty law. Nevertheless, Plaintiffs and *Amici* reject the relevance of all federal wrongful death statutes, except the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674.

Congress has enacted several "federal" wrongful death statutes. While each statute is intended to address a specific subject, they all have one thing in common—only pecuniary damages are recoverable. FELA, 45 U.S.C. App. §§ 51-59, enacted in 1908 to provide a remedy to railroad workers injured or killed, has been interpreted consistently by the courts to allow recovery of only pecuniary damages. *Vreeland*, 227 U.S. at 71; *American Railroad Co. of Porto Rico v. Didricksen*, 227 U.S. 145, 149-50 (1913). The Jones Act, enacted in 1920, creates a wrongful death action for seamen killed in the course of their employment through incorporation of FELA. DOHSA, also enacted in 1920, is a general statute and has the broadest application as it creates a death action for any "person" killed on the high seas. Both DOHSA and the Jones Act allow for the recovery of only pecuniary losses for wrongful death. *Miles*, 498 U.S. at 31-33; *Higginbotham*, 436 U.S. at 624-25.

These statutes are a manifestation of a congressional policy as to the types of wrongful death damages permitted under "federal" wrongful death law and are the most fertile source for a federal common law. The Ninth Circuit recognized the obvious relevance of these federal statutes in *Mexico City*, 708 F.2d at 415, where the court, taking guidance from *Moragne*, held that the Warsaw Convention creates a cause of action for wrongful death. As to the subsidiary elements of the Convention cause of action, the court suggested as potential references federal statutes, "particularly" DOHSA, to answer the damage issues not addressed by the Convention. *Id.* at 415 & n. 27.

The only federal statute Plaintiffs and *Amici* argue is relevant is the FTCA, which directs the courts generally to state law for a determination of recoverable compensatory damages. Plaintiffs and *Amici*, however, ignore the 1947 amendment to the FTCA.[44] The 1947 amendment provides in relevant part:

> If, however, in any case wherein death was caused, the law of the place . . . provides . . . for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, *measured by the pecuniary injuries* resulting from such death. . . .

28 U.S.C. § 2674 (emphasis added).

Courts applying this provision specifically look to DOHSA and FELA for guidance to determine the types of recoverable pecuniary damages in an applicable FTCA case. *See Hoyt v. United States*, 286 F.2d 356, 358-59 (5th Cir. 1961); *Montellier v. United States*, 202 F. Supp. 384, 420 (E.D.N.Y. 1962), *aff'd*, 315 F.2d 180 (2d Cir. 1963). Thus, even under

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[44] The FTCA was amended in 1947 to address the problem that arose under the wrongful death statutes of certain states, such as Alabama and Massachusetts, which provided that the only damages recoverable for wrongful death are punitive in nature. *See Massachusetts Bonding & Ins. Co. v. United States*, 352 U.S. 128, 129-31 (1956); H.R. Rep. No. 748, 80th Cong., 1st Sess. (1947).

the FTCA, when damages are to be determined under a "federal" law standard, only pecuniary damages are allowed.

DOHSA and the other federal wrongful death statutes have not remained stagnant but have been applied with no difficulty by the courts on a regular basis for over 75 years. During this time, Congress has never amended the statutes to allow for the recovery of nonpecuniary damages and the Court consistently has rejected all judicial attempts to allow the recovery of nonpecuniary damages under these statutes. *Miles*, 498 U.S. at 31-33 (Jones Act); *Higginbotham*, 436 U.S. at 624-25 (DOHSA); *Vreeland*, 227 U.S. at 71 (FELA).

Each time damages are determined at the federal level, Congress has specifically chosen a policy to allow only for the recovery of pecuniary losses. In developing a federal common law of damages to be applied in Warsaw Convention cases, there is no reason not to follow these clear directions of Congress. Indeed, this is the only way the Court can give effect both to DOHSA and Congressional policy in fashioning a national law of recoverable compensatory damages in all Warsaw Convention cases, whether arising from land based Article 17 accidents or those occurring on the high seas.

C. State Law and Civil Rights Cases Are Inappropriate Sources of Federal Common Law for Warsaw Convention Cases

Faced with the uniform federal policy expressed in all federal wrongful death statutes and the general maritime law, that loss of society damages are not recoverable, Plaintiffs and *Amici* argue that the proper source for federal common law is state law and civil rights cases. Federal common law is that law fashioned by federal courts through their interpretation of what Congressional policy would be and is not based upon any calculation of the majority of decisions from states. *Milwaukee*, 451 U.S. at 304.

Neither the statutes nor decisions of a particular state should be conclusive when fashioning a federal common law.

While many states today recognize loss of society damages, some states do not[45], others place monetary caps on nonpecuniary awards,[46] others only allow recovery for death of a spouse and/or a minor child[47] and some require financial dependency.[48] Moreover, some courts are reluctant to recognize loss of society damages absent specific statutory provisions allowing such damages. *See, e.g., Siciliano v. Capitol City Shows, Inc.*, 124 N.H. 719, 725, 475 A.2d 19, 21-22 (N.H. 1984); *Liff*, 49 N.Y.2d at 633, 404 N.E.2d at 1292, 427 N.Y.S.2d at 750. In fact, many states do not allow recovery of loss of society damages by nondependent parents. *See Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455, 460-61 & n.5 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986). While there are policy arguments on both sides as to the propriety and impropriety of loss of society damages,[49] it cannot be denied that such nonpecuniary damages are controversial. If such a recovery is to be allowed at the federal level, it should be for Congress, and not the courts to do so, especially in view of the fact that each time Congress has spoken directly on the types of wrongful death damages to be assessed at the federal level, it has allowed recovery for pecuniary losses only.

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[45] *See, e.g., Liff v. Schildkrout*, 49 N.Y.2d 622, 404 N.E.2d 1288, 427 N.Y.S.2d 746 (N.Y. 1980); Del. Code Ann. tit. 10, 3724 (Supp. 1994); D.C. Code Ann. § 16-2701 (1981).

[46] *See, e.g.*, Kan. Stat. Ann. § 60-1903 (1994); Me. Rev. Stat. Ann. tit. 18-A, § 2-804 (West 1981 & Supp. 1994); Wis. Stat. Ann. § 895.04 (West 1993 & Supp. 1994).

[47] *See, e.g., Zimmerman v. Lloyd Noland Foundation, Inc.*, 582 So. 2d 548 (Ala. 1991); *Siciliano v. Capitol City Shows Inc.*, 124 N.H. 719, 475 A.2d 19 (N.H. 1984); *Carey v. Lovett*, 132 N.J. 44, 622 A.2d 1279 (N.J. 1993); *Gillispie v. Beta Construction Co.*, 842 P.2d 1272 (Alaska 1992); Ky. Rev. Stat. Ann. §§ 411.135, 145 (Michie 1992); Vt. Stat. Ann. tit. 14, § 1492 (Supp. 1994).

[48] *See State v. Bouras*, 423 N.E.2d 741, 746 (Ind. Ct. App. 1981); *Masunaga v. Gapasin*, 57 Wash. App. 624, 790 P.2d 171, *review denied*, 115 Wash. 2d 1012, 798 P.2d 780 (Wash. 1990).

[49] *See Higginbotham*, 436 U.S. at 623-25; *Gaudet*, 414 U.S. at 605-11 (Powell, J., dissenting); *Siciliano*, 124 N.H. at 725, 475 A.2d at 27-22.

For similar reasons, the civil rights cases cited by Plaintiffs and the *Lockerbie Amici* are inappropriate reference points for the development of a federal common law as to wrongful death damages.[50] The Civil Rights Act, 42 U.S.C. § 1983, was enacted to address a specific type of harm related to the deprivation of a right, privilege or immunity secured by the Constitution or the laws of the United States. *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 7 (1st Cir. 1986). The statute is not a general wrongful death statute and does not apply where there has been no state action or where no constitutional right has been violated. *See Kaznoski v. Consolidated Coal Co.*, 368 F. Supp. 1022 (W.D. Pa.), *aff'd*, 506 F.2d 1051 (3d Cir. 1974). The civil rights cases awarding damages did so only after a careful review of the federal policy expressed in the civil rights legislation and the wrong the legislation was intended to prevent. The rationale of these cases cannot be given general application outside the context of the sphere of civil rights.

To adopt the rule urged by Plaintiffs and *Amici* would necessarily require the rejection of DOHSA.[51] The rule urged by KAL gives effect to DOHSA and is in accord with the policy of other federal statutes. If a uniform federal damage rule is to be adopted for Warsaw Convention cases, the most appropriate rule is general maritime law and the federal wrongful death statutes, such as DOHSA, which uniformly reject recovery of loss of society damages.

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50 *See* Plaintiffs' Brief at 20-22 and *Lockerbie Amicus Brief* at 22.

51 Almost all international flights involving the United States transverse the high seas for the majority of the flight. *See Williams v. United States*, 711 F.2d 893, 896 (9th Cir. 1983).

IV

EVEN IF LOSS OF SOCIETY DAMAGES ARE HELD TO BE AVAILABLE FOR A DEATH ON THE HIGH SEAS, THE COURT BELOW PROPERLY LIMITED RECOVERY TO DEPENDENT RELATIVES

"[I]t is inherent in the nature of wrongful death remedies that not every survivor is entitled to recover monetary damages. A line must be drawn." *Anderson v. Whittaker Corp.*, 692 F. Supp. 764, 772 (W.D. Mich. 1988), *aff'd in relevant part*, 894 F.2d 804 (6th Cir. 1990). The court below, recognizing that a line must be drawn, adopted the "well-established" rule under general maritime law that only dependent relatives may recover damages for loss of society. *Zicherman*, 43 F.3d at 22 (A8).

Plaintiffs and *Amici* reject the line drawn by the court below and other Circuit Courts of Appeal, as "absurd", unfair and irrational. Plaintiffs argue that "close family members" should be the line, the *Lockerbie Amici* suggest the adoption of the DOHSA schedule of beneficiaries and the *KAL Amici* offer no line.[52] These positions ignore the policy reasons and rationale underlying the adoption by the courts of financial dependency as the "most rational, efficient and fair" line. *Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

The Second, Fifth and Sixth Circuits, faced with determining the appropriate beneficiaries for loss of society damages, have been guided by *Moragne* and *Gaudet*, which suggest that dependency and uniformity are the critical factors,[53] and have drawn the line at financial dependency. *See*

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[52] Plaintiffs' Brief at 22-23; *Lockerbie Amicus Brief* at 4-8; *KAL Amicus Brief* at 23-24.

[53] Although the Court has not specifically addressed the issue of appropriate beneficiaries, the Court has made reference to the intended beneficiaries as those "dependent" on the decedent. *Gaudet*, 414 U.S. at 501; *Moragne*, 398 U.S. at 382.

Lockerbie II, 37 F.3d at 829-30; *Wahlstrom*, 4 F.3d at 1091-93; *Anderson v. Whittaker Corp.*, 894 F.2d 804, 811-12 (6th Cir. 1990); *Melrose*, 882 F.2d at 988.

Denial of loss of society damages to a nondependent sibling and parent is consistent with the goal of uniformity because no one (spouse, parent, child, sibling) may recover for loss of society under DOHSA or the Jones Act. *Miles*, 498 U.S. at 27-32; *Higginbotham*, 436 U.S. at 623-26; *Sistrunk*, 770 F.2d at 459. Moreover, under DOHSA and general maritime law, a nondependent sibling is not entitled to recover even pecuniary damages. *Zicherman*, 43 F.3d at 22 (A10); *Evich v. Connelly*, 759 F.2d 1432, 1433 (9th Cir. 1985), *cert. denied*, 484 U.S. 914 (1987); *Bergen*, 816 F.2d at 1350; *In re ABC Charters, Inc.*, 558 F. Supp. 364, 366 (W.D. Wash. 1983).

Even the adoption of the DOHSA schedule of beneficiaries ("spouse, parent, child, or dependent relative"), as suggested by the *Lockerbie Amici*, would *not* allow a nondependent parent or sibling to recover loss of society damages. 46 U.S.C. App. § 761. As to a parent, to simply adopt DOHSA or the Jones Act beneficiaries would "adopt language from either statute without reference to how that language fits into each statute as a whole." *Anderson*, 894 F.2d at 812 n.8. DOHSA and the Jones Act "sets up a scheme where dependents are protected, to the exclusion of other persons who may conceivably have suffered injury." *Id.* Therefore, the requirement of financial dependency is written into the statute, insofar as damages are expressly limited to "pecuniary loss." *Id*; *see Melrose*, 882 F.2d at 989; *Sistrunk*, 770 F.2d at 459-61.

The only case Plaintiffs and *Amici* cite as supporting their argument is *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), a general maritime law action for five persons killed and four persons injured when a pleasure craft collided with a buoy in California territorial waters. *Id.* at 906. The district court awarded the parents of the decedents substantial damages for loss of society, regardless of dependency on the decedents. *Id.* at 915, 920. The Ninth Circuit affirmed, concluding that the dependency requirement for recovering loss of society dam-

ages is inconsistent with the humanitarian policy of providing special solicitude to those who come within the admiralty jurisdiction of the federal courts. *Id.* at 919-20. The court rejected the relevance of *Miles* and *Higginbotham*, reasoning: "The fact that the death of a seaman in territorial waters leads to recovery only of pecuniary damages is dictated by statute, *Miles*, 498 U.S. at 32-33, 111 S.Ct. at 325-26, and that statute does not limit recoveries for the deaths of non-seamen." *Sutton*, 26 F.3d at 917.

The decision in *Sutton* is inconsistent with *Miles* in that it created a non-uniform rule of recovery within the Ninth Circuit. *See Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) (the uniformity requirement in *Miles* requires the conclusion that the spouse of an injured seaman may *not* recover loss of society damages under general maritime law). Thus, in the Ninth Circuit, as a result of *Sutton*, beneficiaries of non-seamen can recover loss of society, but beneficiaries of seamen cannot.

Moreover, the *Sutton* court gave little weight to the uniformity requirement of *Miles*, noting the inconsistent results reached by the Court in *Gaudet* and *Higginbotham*. 26 F.3d at 917 ("We do not consider ourselves free to give such weight to the interest of uniformity"). Regardless of the effects of *Gaudet* and *Higginbotham* on uniformity, *Miles* made clear that the Court was "restoring" uniformity to the maritime law and that the maritime statutes are to serve as the lower courts' primary guide in defining the elements of general maritime law.[54] *Sutton* is contrary to the principles of *Miles* and should be disregarded.

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[54] The *Sutton* court also stated that "[w]e . . . do not consider controlling the statement in *Miles* that '[t]he holding of *Gaudet* . . . applies only to longshoremen.' 498 U.S. at 39, 111 S. Ct. at 328. The point that the court was making was that *Gaudet* does not apply to seamen." 26 F.3d at 917 n. 19. No Circuit Court of Appeals has given such a limited reading of this language in *Miles*. *See Wahlstrom*, 4 F.3d at 1091-92; *Murray*, 958 F.2d at 130-31; *Miller*, 989 F.2d at 1459.

Similarly, the civil rights cases relied upon by Plaintiffs and *Amici* expressly reject the recovery of loss of society damages by siblings for many of the same reasons expressed by the courts in maritime cases—a line must be drawn. *See Bell v. City of Milwaukee*, 746 F.2d 1205, 1247 (7th Cir. 1984).

Finally, even if the Court were to look to state law, many states do not allow siblings or parents to recover for loss of society. *See Sistrunk*, 770 F.2d at 461 n. 5 (setting forth various state law provisions); *supra* notes 61-64 and accompanying text. In fact, some states impose a financial dependency requirement akin to general maritime law. *See supra* note 48.

So long as *Gaudet* remains, anomalies will continue to exist between general maritime law, DOHSA and the Jones Act. Should the Court conclude that loss of society damages are recoverable under the Warsaw Convention for a death on the high seas, limiting such a recovery to dependents will at least maintain some of the uniformity that exists today. Plaintiffs' line of "close family members" is neither helpful, nor supported by any federal or state law and ignores the entire body of general maritime law, a source of law Plaintiffs acknowledge to exist, but selectively ignore.

CONCLUSION

The judgment of the Court of Appeals that loss of society damages are recoverable for a death on the high seas in a death action governed by the Warsaw Convention should be reversed. But, if recovery is to be allowed, it should be only for those who demonstrate financial dependency at the time of decedent's death.

Respectfully submitted,

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Dated: July 1, 1995